Champaign Builders Supply Company *and* Teamsters Local Union No. 26. Case 25–CA–114095

December 16, 2014

DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA, AND SCHIFFER

On August 7, 2014, Administrative Law Judge Melissa M. Olivero issued the attached decision. The Respondent filed exceptions with supporting argument, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

ORDER

The National Labor Relations Board orders that the Respondent, Champaign Builders Supply Company, Champaign, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to timely notify the Union, Teamsters Local Union No. 26, and afford it an opportunity to bargain over the effects of the decision to close its business in September 2013.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning the effects of the decision to close its business and, if an understanding is reached, embody the understanding in a signed agreement:

> All truck drivers, truck driver helpers, warehousemen, general yardmen, end loader drivers and mechanics employed by Champaign Builders Supply Company; but excluding office clerical employees, plant clerical employees, guards, professional employees and supervisors as defined in the Act.

(b) Pay its former employees in the unit described above their normal wages when in the Respondent's employ from 5 days after the date of this Decision and Or-

[1] At several points in her decision, the judge used language that could suggest that the Respondent had an obligation to bargain over its decision to close its business. There is no such complaint allegation, however. Moreover, read in its entirety, the judge's decision is clear that she found that the Respondent had an obligation to bargain only over the *effects* of its decision to close, and that the Respondent failed to satisfy that obligation. In affirming the judge's findings in both respects, we agree with her that the Respondent's effects bargaining obligation is to bargain to impasse or agreement. See *Dallas & Mavis Specialized Carrier Co.*, 346 NLRB 253, 257 (2006). We do not interpret the judge's decision as our concurring colleague does and, therefore, do not agree with his suggested corrections and clarifications to the decision.

Member Miscimarra concurs in the majority's adoption of the judge's decision, subject to the qualification described above, and he believes the judge's decision warrants correction or clarification in several additional respects. First, Respondent's failure to alter its plans regarding the shutdown of its facility is not evidence of an effects-bargaining violation, since a premise of effects bargaining is often that the employer has already made an underlying decision, and effects bargaining does not require any reconsideration of that decision. *First National Maintenance Corp. v NLRB*, 452 U.S. 666, 681–682 (1981) (partial closing "decision" is not a mandatory subject of bargaining even though meaningful bargaining over the "effects" is required). Second, contrary to the judge's statement that "offering to discuss a matter with a union does not equate to good-faith bargaining," Member Miscimarra believes that the word "discuss" in most circumstances would be intended and understood to mean bargaining, and the parties' conduct itself controls whether the parties have satisfied the requirements of Sec. 8(a)(5) or 8(b)(3). In the case the judge cited for the above-quoted proposition, *Mi Pueblo Foods,* 360 NLRB No. 116 (2014), the employer offered to "discuss" its plans with the union, while also making it clear that it was not bargaining and was instead contesting the union's certification. Id., slip op. at 17-18; see also *International Union, UAW v. NLRB (National Metalcrafters, Inc.)*, 802 F.2d 969, 973–975 (7th Cir. 1986) (agreement provided that the employer would "discuss" relocations and "negotiate" regarding their effects, and court remands case to Board for an evaluation of whether the parties' bargaining history indicated the words "discuss" and "negotiate" were intended to have identical or different meanings). Third, Member Miscimarra agrees that the Respondent's failure to engage in effects bargaining here was not excused or justified by economic exigency. However, the judge's decision is incorrect to the extent it suggests "no case law" supports the proposition that bargaining may sometimes be excused by "economic necessity." See, e.g., *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd. 15 F.3d 1087 (9th Cir. 1994) (noting the Board "has recognized" a limited "exception" to the normal bargaining requirements "when economic exigencies compel prompt action") (citations omitted); *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 81–82 (1995) (certain extraordinary "compelling economic considerations" have been "long recognized as excusing bargaining entirely," and "other economic exigencies, although not sufficiently compelling to excuse bargaining altogether," may permit implementation without an overall impasse where "time is of the essence and . . . demand[s] prompt action" and where "the exigency was caused by external events, was beyond the employer's control, or was not reasonably foreseeable") (citations omitted).

[2] We shall modify the judge's recommended Order to conform to the Board's standard remedial language. In adopting paragraph 2(c) of the Order, we rely on *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014). We shall substitute a new notice to conform to the violations found and to the Order as modified.

der until the occurrence of the earliest of the following conditions: (1) the Respondent bargains to agreement with the Union about the effects of the decision to close its business; (2) the parties reach a bona fide impasse in bargaining; (3) the Union fails to request bargaining within 5 days after the receipt of this Decision and Order, or to commence negotiations within 5 days after receipt of the Respondent's notice of its desire to bargain with the Union; or (4) the Union subsequently fails to bargain in good faith; but in no event shall the sum paid to any of the employees exceed the amount he or she would have earned as wages from the date in September 2013 when the employee was terminated as a result of Respondent closing its business, to the time he or she secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner; provided, however, that in no event shall this sum be less than the affected employees would have earned for a 2-week period at the rate of their normal wages, with interest, as set forth in the remedy portion of this Decision and Order.

(c) Compensate former unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, the Respondent shall duplicate and mail, at its own expense and after being signed by the Respondent's authorized representative, copies of the attached notice marked "Appendix"[3] to the Union and to all unit employees who were employed by the Respondent at any time since September 1, 2013.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 25 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Mailed by Order of the National Labor Relations Board" shall read "Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. December 16, 2014

Philip A. Miscimarra, Member

Kent Y. Hirozawa, Member

Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX
NOTICE TO EMPLOYEES
MAILED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to mail and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail to timely notify the Union, Teamsters Local Union No. 26, and afford it an opportunity to bargain over the effects of the decision to close our business.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit concerning the effects of the decision to close our business and, if an understanding is reached, embody the understanding in a signed agreement:

All truck drivers, truck driver helpers, warehousemen, general yardmen, end loader drivers and mechanics employed by Champaign Builders Supply Company; but excluding office clerical employees, plant clerical employees, guards, professional employees and supervisors as defined in the Act.

WE WILL pay former unit employees their normal wages for a period of time set forth in the Decision and Order of the National Labor Relations Board, with interest.

WE WILL compensate former unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/25-CA-114095 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

Katherine E. Miller, Esq. and *Debra Stefanik, Esq.,* for the General Counsel.
David L. Miller, for the Respondent.

DECISION

STATEMENT OF THE CASE

MELISSA M. OLIVERO, Administrative Law Judge. This case was tried in Peoria, Illinois, on March 24, 2014. Teamsters Local Union No. 26 (the Union) filed the charge on September 24, 2013, and the General Counsel issued the complaint on January 31, 2014.[1] (GC Exh. 1(a), (b), (d).) The complaint alleges that Champaign Builders Supply Company (Respondent) violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain with the Union over the effects of Respondent's decision to close its business. (GC Exh. 1(d).) Respondent timely filed an answer to the complaint denying the alleged violation of the Act. (GC Exh. 1(h).) The parties were given a full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record,[2] including my own observation of the demeanor of the witnesses,[3] and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, engaged in the manufacture and nonretail sale of concrete and other building materials at its facility in Champaign, Illinois, where it annually purchased and received goods valued in excess of $50,000 directly from points outside the State of Illinois. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Overview of Respondent's Operations and Management Structure

Respondent was a ready-mix concrete supplier to the construction industry, until it closed its business in September 2013.[4] (Tr. 16.) At all relevant times, Marsha Elliott was Respondent's director. At the hearing Respondent admitted, and I find, that Marsha Elliott was a supervisor of Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act. (Tr. 10–12.) Gloria Blager, Marsha Elliott's mother, was Respondent's owner. (Tr. 13–14.) Lindsey Elliott, Marsha Elliott's daughter, was also employed by Respondent as a bookkeeper.[5] (Tr. 21.)

At all relevant times, Curtis Eichen was Respondent's sales manager and batchman. (Tr. 16.) As sales manager, Eichen set up accounts, visited customers, and generated business for Respondent. (Tr. 17.) As batchman, Eichen was responsible for the production of concrete. (Tr. 17.) Eichen's other duties included dispatching, picking up mail, and making bank deposits. (Tr. 17, 31.)

B. Respondent's Collective-Bargaining Relationship with the Union

Since 1968, the Union had been the exclusive collective-bargaining representative of a unit of Respondent's employees. (GC Exh. 1(i).) This unit consisted of truck drivers, truck driver helpers, warehousemen, general yardmen, loader drivers, and mechanics. (Id.) Respondent's most recent collective-bargaining agreement with the Union was effective from September 10, 2011, to September 9, 2014. (GC Exh. 3.) Marsha Elliott signed this collective-bargaining agreement on behalf of Respondent. (Id.)

David Marxmiller has served as a vice president, business representative, and organizer for the Union since April 2012. (Tr. 36–37.) Marxmiller's uncontroverted testimony estab-

[1] Abbreviations used in this decision are as follows: "Tr." for transcript; "R. Exh." for Respondent's Exhibit; "GC Exh." for General Counsel's Exhibit; "R. Br." for Respondent's Brief; and "GC Br." for the General Counsel's Brief. The Charging Party did not file a brief.

[2] I make the following correction to the transcript: Tr. 21, L. 22: "contractor" should be "contract."

[3] Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather on my review and consideration of the entire record for this case. I further note that my findings of fact encompass the credible testimony and evidence presented at trial, as well as logical inferences drawn therefrom.

[4] All dates are in 2013 unless otherwise indicated.

[5] Marsha Elliot, Gloria Blager, and Lindsey Elliott were not called as witnesses at the hearing.

lished that Marsha Elliott was his only point of contact with Respondent regarding issues such as seniority, overtime, and discipline. (Tr. 39.) By way of example, Marxmiller testified that he spoke with Marsha Elliott over the phone in August to discuss the discharge of a unit employee. (Tr. 39.) The employee's termination letter was signed by Marsha Elliott. (GC Exh. 8.) Marxmiller subsequently filed a grievance over this termination and addressed it to Marsha Elliott. (GC Exh. 9; Tr. 41.) Eichen received and signed for this grievance on behalf of Respondent on September 5.[6] (GC Exh. 9.)

C. Respondent's Discussion of Its Decision to Close with the Union

Sometime in 2013, Marxmiller began hearing rumors that Respondent's business might close. (Tr. 41–42.) Marxmiller tried to call Marsha Elliott about these rumors, but was unable to reach her. (Tr. 42.)

On August 21, Marxmiller went to Respondent's office and met with Marsha Elliott. (Tr. 42.) The meeting took place in the front lobby area of Respondent's office and lasted 15 to 30 minutes. (Tr. 54; 66–67.) Eichen observed parts of Marxmiller's conversation with Marsha Elliott, but he was also performing other work at the same time.[7] (Tr. 54–55; 71–72.)

Marxmiller told Marsha Elliott that he had heard that Respondent's business was closing and said that he wished to engage in effects bargaining on behalf of the Union's members. (Tr. 43.) Marsha Elliott replied that nothing in the collective-bargaining agreement required her to engage in effects bargaining. (Id.) Marxmiller reminded her that the parties' contract remained in effect until September 2014. (Tr. 44.)

Marsha Elliott told Marxmiller that she was starting to pay out vacation time. (Tr. 44; 69.) She also stated that she was intending to pay out the last two bonuses as required by the contract. (Tr. 69–70.) Marxmiller talked about extending healthcare coverage through September 2014, as well as a severance package and bonus. (Id.) Marsha Elliott said that Respondent would cover healthcare until the end of October, but added that it was not her decision to make. (Tr. 70.) Marxmiller asked Marsha Elliott to get back to him when she had an answer or knew what was going to happen. (Id.) No one took notes at this meeting and no proposals or agreements were put in writing. (Tr. 45.)

On September 5, Marxmiller sent Respondent a certified letter seeking effects bargaining over Respondent's decision to close its business.[8] (GC Exh. 6; Tr. 45.) It is undisputed that Respondent was still doing business as of that date. (GC Exh. 10; Tr. 22.) Respondent did not respond to Marxmiller's letter. (Tr. 46.) Marxmiller attempted to reach Marsha Elliott by telephone once or twice after he sent his letter. (Tr. 53.) Although Marxmiller left at least one voicemail message for Marsha Elliott, she did not respond. (Id.)

D. Respondent Closes Its Business

During Respondent's last month of operations, its employees were no longer delivering concrete. The few employees that remained in September were involved in inventory, cleanup, and maintenance activities. (Tr. 22.) Finally, around September 28, Marsha Elliott held a meeting with Respondent's employees and announced that there was no longer any work available. (Tr. 22.)

The Union did not receive any sort of notification that Respondent had closed its business. (Tr. 46–47.) In fact, Respondent never contacted Marxmiller at any time subsequent to September 5. (Tr. 46.) In October 2013, Marxmiller drove by Respondent's Champaign, Illinois facility and found it closed. (Tr. 49.) A notice posted on the front door of the facility, signed by Marsha Elliott, indicated that Respondent had ceased doing business. (GC Exh. 11.)

DISCUSSION AND ANALYSIS

A. Witness Credibility

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group,* 339 NLRB 303, 305 (2003); *Daikichi Sushi,* 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group,* 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi,* 335 NLRB at 622. My credibility findings are generally incorporated into the findings of fact set forth above.

I found Eichen's testimony to be credible. He appeared certain in his responses to questions on both direct and cross-examination. He did not appear to embellish his testimony. Eichen candidly admitted that he did not hear the entire conversation of Marxmiller and Marsha Elliott because he was doing other work. Furthermore, Eichen had nothing to gain by his testimony as he was not a member of the bargaining unit.[9] Given his candid and largely uncontradicted testimony, I credit Eichen above other witnesses.

I found Marxmiller to be a generally credible witness. However, Marxmiller contradicted himself on cross-examination. When asked why Marsha Elliott was paying out vacation time to Respondent's employees, Marxmiller testified that he did not know. A few moments later Marxmiller admitted that she was paying out the vacation time because Respondent was closing

[6] Eichen's uncontradicted testimony establishes that Marsha Elliott specifically authorized him to receive mail on behalf of Respondent. (Tr. 28.)

[7] I credit Eichen's testimony regarding what he observed during the conversation between Marxmiller and Marsha Elliott. Although Eichen candidly admitted that he was in and out and doing other work during the conversation, his testimony seemed forthright and honest. His testimony was not discredited in any way on cross-examination and he testified in a steady manner. His testimony and that of Marxmiller was similar in most respects. However, where Eichen's testimony diverges from that of Marxmiller, I credit Eichen.

[8] Although Marxmiller's letter was sent on September 5, it was not signed for by Lindsey Elliott until October 19. (GC Exh. 6; Tr. 46.)

[9] Eichen was employed as a sales manager by Respondent. Respondent's timesheets indicate he was a salaried employee. (GC Exh. 10.)

its business. (Tr. 56–57.) In addition, Marxmiller intimated on direct examination that he did not know that Respondent had closed until he drove by in October. (Tr. 49.) Later, under cross-examination, he admitted that he knew in September. (Tr. 53–54.) As such, I credit Marxmiller's testimony except where his testimony diverges from that of Eichen.

B. Respondent Violated the Act in Failing to Engage in Effects Bargaining With the Union

Section 8(a)(5) of the Act states that it is an unfair labor practice for an employer to refuse to bargain collectively with the representatives of its employees. 29 U.S.C. §158(a)(5). Section 8(d) of the Act explains that "to bargain collectively" is to "meet and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder." 29 U.S.C. §158(d).

When an employer decides to close a facility solely for economic reasons, it is not obliged to bargain over that decision, but it is required to negotiate with its unit employees' bargaining representative concerning the effects of its decision. *Smurfit-Stone Container Enterprises,* 357 NLRB No. 144, slip op. at 2 (2011), citing *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681–682, 686 (1981). Bargaining over the effects of such a decision must be conducted in a meaningful manner and at a meaningful time. *First National Maintenance,* 452 U.S. at 682. Effects bargaining must occur sufficiently before the actual implementation of the decision so that the union is not presented with a fait accompli. *Komatsu America Corp.,* 342 NLRB 649, 649 (2004).

Marxmiller's uncontroverted testimony establishes that Respondent never provided the Union with official notice of its decision to close its business. Instead, Marxmiller came to Respondent's Champaign facility to inquire about rumors he had heard concerning Respondent closing its business. Marsha Elliott announced to the represented employees that the business was closing on the last day they worked, however this notice does not satisfy Respondent's obligation to notify the Union. Notice to individual employees does not constitute notice to the bargaining agent. *Bridon Cordage, Inc.,* 329 NLRB 258, 259 (1999). Marxmiller later learned that the business had closed after seeing a notice to this effect posted in Respondent's front window in September or October. Accordingly, I find that Respondent did not satisfy its obligation to timely notify the Union of its decision to close.

Furthermore, Respondent did not satisfy it obligation to engage in meaningful bargaining regarding its decision to close. Good-faith bargaining requires timely notice and a meaningful opportunity to bargain regarding the employer's proposed change. *Dorsey Trailers, Inc.,* 327 NLRB 835, 858 (1999), enf. granted in part and denied in part 233 F.3d 831 (4th Cir. 2000). Additionally, if the notice is given too short a time before implementation, or if the employer has no intention of changing its mind, then the notice is nothing more than a fait accompli. *Brannan Sand & Gravel,* 314 NLRB 282, 282 (1994); *Ciba-Geigy Pharmaceuticals Division,* 264 NLRB 1013, 1017–1018 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983). Here, Marsha Elliott's actions did amount to meaningful effects bargaining. She spoke to Marxmiller only briefly. Although she listened to Marxmiller's suggestions, no evidence indicates that she altered her plans regarding the shutdown in any way. She did not respond to Marxmiller's suggestions or repeated requests for further bargaining. As such, I find that Respondent did not satisfy its obligation to engage in good-faith bargaining with the Union regarding the effects of its decision to close its business.

I find no merit in Respondent's answer to the complaint in which it denied that a letter seeking effects bargaining was sent by Marxmiller. (GC Exh. 1(h) par. 6(b); GC Exh. 6.) Marxmiller testified that after his conversation with Marsha Elliot, he sent a certified letter to Respondent seeking effects bargaining. (GC Exh. 6; Tr. 45.) Respondent provided no evidence disputing that Marxmiller sent the letter. Furthermore, the letter was clearly received by Respondent when it was signed for by Lindsey Elliott. Proof of mailing with proper address and postage raises a rebuttable presumption that Respondent received the letter in the ordinary course of business. See *Communication Workers Local 9201 (Pacific Northwest Bell),* 275 NLRB 1529, 1530 (1985), citing *Communication Workers Local 11500 (American Telephone),* 272 NLRB 850, 851 (1984). Respondent provided no evidence refuting that the certified letter was received by Lindsey Elliott on its behalf. The uncontroverted evidence establishes that Lindsey Elliott signed for Marxmiller's letter and that Lindsey Elliott was an employee of Respondent and Marsha Elliott's daughter. Thus, I find that Respondent received Marxmiller's certified letter seeking effects bargaining.

Although Respondent had ceased doing business by the time that Lindsey Elliott belatedly signed for Marxmiller's letter, Respondent still received it. Respondent cannot escape its bargaining obligation by failing or refusing to timely sign for a certified letter. Failure or refusal to claim certified mail does not defeat the purposes of the Act. See *ITAL General Construction, Inc.,* 331 NLRB No. 64 (2000) (not published in Board volumes); and *Michigan Expediting Service,* 282 NLRB 210 fn. 6 (1986), enfd. 869 F.2d 1492 (6th Cir. 1989). Thus, Respondent's failure to timely sign for Marxmiller's letter, which was sent while Respondent was still operating its business, does not excuse its failure to engage in the requested effects bargaining.

Marxmiller's uncontroverted testimony, coupled with his letter of September 5 seeking effects bargaining, lead to the conclusion that Respondent did not engage in good faith negotiations regarding its decision to close its business. At the time that Respondent ceased operations, Respondent and the Union had not reached any sort of agreement, or come to a good-faith impasse, over the effects of Respondent's decision to close its business. The Board has found a violation of Section 8(a)(5) and (1) when, at the time of the implementation of a decision, the parties had not reached agreement and were not at an impasse. *Tesoro Refining & Marketing,* 360 NLRB No. 46, slip op. at 2 fn. 5 (2014). Similarly, in this case, the evidence establishes that Respondent and the Union had not reached any sort of agreement regarding the effects of Respondent's decision to close its business and were not at impasse. As such, I find that Respondent failed to satisfy its obligation to bargain in good

faith regarding its decision to close its business and violated Section 8(a)(5) and (1) of the Act.

Moreover, even accepting as true Respondent's tenuous argument that Marsha Elliott did not have authority to bargain on behalf of Respondent, I cannot find that Respondent satisfied its bargaining obligation.[10] The only person with whom Marxmiller had ever dealt was Marsha Elliot. Respondent's argument also seems nonsensical given that Marsha Elliott signed the most recent collective-bargaining agreement with the Union on Respondent's behalf. Furthermore, if Marsha Elliot lacked authority to bargain on Respondent's behalf, Respondent failed to identity anyone who had such authority. Sending a representative to the table without sufficient authority to reach an agreement does not attain the stature of good faith effects bargaining. *American Needle & Novelty Co.,* 206 NLRB 534, 543 (1973). This failure, coupled with Respondent's failure to engage in the ordinary give-and-take required of good-faith negotiations, demonstrate a lack of good-faith bargaining. See, e.g., *Penntech Papers, Inc.,* 263 NLRB 264, 276 (1982) (Board affirms judge's finding of a violation of the Act where respondent did not cloak its negotiator with sufficient authority and adopted a take-it-or-leave-it attitude which foreclosed a good-faith exchange of ideas). Therefore, if Marsha Elliott lacked authority to bargain with Marxmiller on Respondent's behalf, this provides further evidence that Respondent failed to bargain in good faith.

I reject Respondent's arguments, set forth in its brief, that its actions were somehow excused or justified. Initially, I reject Respondent's argument that economic necessity may have somehow excused its failure to bargain. (See R. Br. 4–5.) Respondent cites no case law in support of this proposition. However, the law is clear that even though an action may be economically motivated, an employer must still notify the union of its contemplated action and bargain over its effects. *Farina Corp.,* 310 NLRB 318, 320 (1993). Respondent further argues that Marsha Elliott offered to "discuss" the future of Respondent's employees with Marxmiller. However, offering to discuss a matter with a union does not equate to good-faith collective bargaining. *Mi Pueblo Foods,* 360 NLRB No. 116, slip op. at 31 (2014). There were no counterproposals made to Marxmiller's suggestions and no explanations were given for Respondent's contemplated actions regarding its employees. See *Dallas & Mavis Specialized Carrier Co.,* 346 NLRB 253, 279 (2006) (finding that a respondent did not engage in meaningful negotiations when it summarily rejected the union's proposals without explanation and did not make any counterproposals). Instead, as I have found, Marsha Elliot presented the Union with nothing more than a fait accompli. She did not engage in any good-faith exchange of ideas with Marxmiller; instead, she merely set forth her intentions regarding Respondent's employees for Marxmiller to hear. She then failed to respond to Marxmiller's letter or voicemail messages seeking effects bargaining. Thus, Respondent's arguments lack merit because its failure to engage in meaningful effects bargaining was not excused by any economic necessity or Marsha Elliott's brief discussion with Marxmiller on August 21.

In sum, Respondent violated Section 8(a)(5) and (1) of the Act by failing to engage in good-faith bargaining with the Union regarding its decision to close its business. Respondent did not provide the Union with timely notice of its intent to close. Respondent's single, brief meeting with Marxmiller did not satisfy its obligation to engage in meaningful bargaining over the effects of its decision. Accordingly, I find that Respondent violated the Act as alleged in the General Counsel's complaint.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By failing to afford the Union prior notice and an opportunity to bargain over the effects of its decision to close its business, Respondent has violated Section 8(a)(5) and (1) and of the Act.
4. The above unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

I will order that Respondent bargain with the Union, on request, over the effects of its decision to close its business, and reduce to writing and sign any agreements reached as a result of such bargaining.

Make-whole relief is not appropriate in effects bargaining cases. See *Fast Food Merchandisers, Inc.,* 291 NLRB 897, 899–902 (1988). The standard remedy in effects bargaining cases is a limited make-whole *Transmarine* remedy, as clarified in *Melody Toyota. Transmarine Navigation Corp.,* 170 NLRB 389 (1968); *Melody Toyota,* 325 NLRB 846 (1998); *Rochester Gas & Electric Corp.,* 355 NLRB 507, 508 (2010); *Stevens International,* 337 NLRB 143, 144 (2001). A *Transmarine* remedy requires an employer to provide employees with limited backpay from 5 days after the date of the decision until the occurrence of one of four specified conditions. See *Transmarine Navigation Corp,* supra at 390.

Furthermore, I will order a limited backpay remedy designed to make any affected bargaining unit members for any losses they suffered as a result of Respondent's failure to bargain about the effects of the decision to close its business. Specifically, for each affected bargaining unit member, Respondent shall pay backpay at the rate of their normal wages from 5 days after the date of this Decision and Order until the occurrence of the earliest of the following conditions: (1) Respondent bargains to agreement with the Union about the effects of the decision to close its business; (2) the parties reach a bona fide impasse in bargaining; (3) the Union fails to request bargaining within 5 days after the receipt of this Decision and Order, or to commence negotiations within 5 days after receipt of Respond-

[10] At the hearing, Respondent's counsel seemed to argue that Marsha Elliott did not have authority to bargain on Respondent's behalf. (Tr. 61–62.) Respondent did not make this argument in its brief, nevertheless I address it here.

ent's notice of its desire to bargain with the Union; or (4) the Union subsequently fails to bargain in good faith; but in no event shall the sum paid to any of the employees exceed the amount he or she would have earned as wages from the date in September 2013 when the employee was terminated as a result of Respondent closing its Champaign, Illinois, facility, to the time he or she secured equivalent employment elsewhere; provided, however, that in no event shall this sum be less than the affected employees would have earned for a 2-week period at the rate of their normal wages. See *Smurfit-Stone Contractor Enterprises,* 357 NLRB No. 144, slip op. at 5–6 (2011), citing *Transmarine Navigation Corp.,* supra.

Backpay shall be based on the earnings that the affected employees would normally have received during the applicable period, and shall be computed in accordance with *Ogle Protection Service,* 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010).

For all backpay required herein, Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year. *Latino Express, Inc.,* 359 NLRB No. 44 (2012).

As Respondent has ceased doing business, it shall be required to mail copies of the attached Notice to Employees marked "Appendix" to its former employees at its own expense.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondent, Champaign Builders Supply Company, Champaign, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to timely notify Teamsters Local Union No. 26 and afford it an opportunity to bargain over the effects of closing its business in September 2013; and

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective bargaining representative of the employees in the following appropriate unit with respect to the effects of the decision to close its Champaign, Illinois facility, and reduce to writing and sign any agreements reached as a result of such bargaining:

> All truck drivers, truck driver helpers, warehousemen, general yardmen, end loader drivers and mechanics employed by Champaign Builders Supply; but excluding office clerical employees, plant clerical employees, guards, professional employees and supervisors as defined in the Act.

(b) Pay its former employees in the unit described above their normal wages when in Respondent's employ from 5 days after the date of this decision and order until the occurrence of the earliest of the following conditions: (1) Respondent bargains to agreement with the Union about the effects of the decision to close its business; (2) the parties reach a bona fide impasse in bargaining; (3) the Union fails to request bargaining within 5 days after the receipt of this decision and order, or to commence negotiations within 5 days after receipt of Respondent's notice of its desire to bargain with the Union; or (4) the Union subsequently fails to bargain in good faith; but in no event shall the sum paid to any of the employees exceed the amount he or she would have earned as wages from the date in September 2013 when the employee was terminated as a result of Respondent closing its Champaign, Illinois, facility, to the time he or she secured equivalent employment elsewhere; provided, however, that in no event shall this sum be less than the affected employees would have earned for a 2-week period at the rate of their normal wages, with interest, as set forth in the remedy portion of this decision and order.

(c) Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year. *Latino Express, Inc.,* 359 NLRB No. 44 (2012).

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, the Respondent shall duplicate and mail, at its own expense and after being signed by the Respondent's authorized representative, copies of the attached notice marked "Appendix"[12] to the Union and to all unit employees who were employed by the Respondent at any time since September 1, 2013.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 7, 2014

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post, mail, and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with the Union, Teamsters Local Union No. 26, regarding the decision to close our Champaign, Illinois, facility.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union with respect to the effects of the decision to close our Champaign, Illinois facility on the employees in the bargaining unit:

All truck drivers, truck driver helpers, warehousemen, general yardmen, end loader drivers and mechanics employed by Champaign Builders Supply; but excluding office clerical employees, plant clerical employees, guards, professional employees and supervisors as defined in the Act.

WE WILL reduce to writing and sign any agreements reached as a result of such bargaining.

WE WILL pay to our former unit employees their normal wages for a period of time specified by the National Labor Relations Board with interest.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate our former employees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

CHAMPAIGN BUILDERS SUPPLY CO.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/25-CA-114095 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (317) 226-7413.